No. 82-999

In The

Supreme Court of the United States

October Term, 1982

Chemetron Corporation,
Petitioner,

v.

Business Funds, Inc., John F. Austin, Jr., and David C. Bintliff,
Respondents.

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LOUIS LOSS
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4626
Counsel of Record for Petitioner

Of Counsel:

JAMES G. PARK
VINCENT C. DELUZIO
CARL E. ROTHENBERGER, JR.
STANLEY YORSZ
Buchanan, Ingersoll,
Rodewald, Kyle
& Buerger, P.C.
57th Floor—600 Grant St.
Pittsburgh, Pennsylvania 15219

JOE H. REYNOLDS
LLOYD R. CUNNINGHAM, JR.
Reynolds, Allen & Cook
Incorporated
1100 Milam Building
16th Floor
Houston, Texas 77002

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TABLE OF AUTHORITIES

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This[1] is both (1) a reply brief pursuant to Rule 22.4, addressed to the Respondents' brief in opposition, and (2) a supplemental brief pursuant to Rule 22.6, addressed to the impact of *Herman & MacLean v. Huddleston*, No. 81-680 (Jan. 24, 1983), on the present case—an impact foreseen in our Petition for Certiorari (p. 5, ¶1): "If the Court affirms *Huddleston* (that is to say, if it decides that a buyer with an express remedy under §11 may nevertheless resort to Rule 10b-5), that decision may well require a reversal here." We now suggest that, in light of *Herman & MacLean*'s rejection of an interpretation of the securities laws that displaces an action under Section 10(b), reversal is in fact mandated.

First: The Court, in affirming *Herman & MacLean*, specifically rejected the view that the express civil reme-

1. *Rule 28.1 statement:* The Petitioner has one parent, Allegheny International, Inc. Its subsidiaries are all wholly owned.

dies of the federal securities laws were exclusive. The Court thus took an approach that differs from the "nullification" analysis and the maxim of statutory construction upon which it is based—*expressio unius est exclusio alterius*—that were used by the Court of Appeals for the Fifth Circuit in both *Chemetron*[2] and *Herman & MacLean*.[3] Instead, if the first full paragraph at page 7 of the *Herman & MacLean* slip opinion were transposed to the present case by merely substituting §9(e) for §11, it would read as follows (deleted material indicated by brackets, substituted material by italics):

> Since Section [11] *9* and Section 10(b) address different types of wrongdoing, we see no reason to carve out an exception to Section 10(b) for *manipulation or* fraud occurring in [a registration statement] *exchange registered securities* just because the same conduct may also be actionable under Section [11] *9(e)*. Exempting such conduct from liability under Section 10(b) would conflict with the basic purpose of the [1933] *1934* Act: [to provide greater protection to purchasers of registered securities] *to protect the public against market manipulation.* It would be anamolous indeed if the special protection afforded to purchasers [in a registered offering by the 1933 Act] *with respect to exchange registered securities by the 1934 Act* were deemed to deprive such purchasers of the protections against manipulation and deception that Section 10(b) makes available to all persons who deal in securities.[4]

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2. *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1155-70 (5th Cir. 1982).

3. *Huddleston v. Herman & MacLean*, 640 F.2d 534, 540-43 (5th Cir. 1981).

4. Footnote 17 in the Court's original paragraph was not included above.

Second: Chemetron presents an even stronger 10b-5 case than *Herman & MacLean* for the reasons stated in the Petition:

1. Here there were two separate substantive violations, as in *United States v. Naftalin*, 441 U. S. 768 (1979), and *SEC v. National Securities, Inc.*, 393 U. S. 453 (1969), both of which are cited in the Petition (p. 6) and in *Herman & MacLean* (pp. 7-8). To deny the present Petitioner access to Rule 10b-5 would be the equivalent,

(a) notwithstanding *Naftalin*, of dismissing an indictment under §17(a) of the 1933 Act, 15 U. S. C. §77q(a), because it involved "ordinary market trading" within the province of Rule 10b-5;

(b) notwithstanding *National Securities*, of dismissing a 10b-5 complaint alleging a fraudulent merger that would have been subject to the proxy rules under §14, 15 U. S. C. §78n, if the company had been registered;

(c) notwithstanding the overlap between §17(a) and the mail fraud statute, *Edwards v. United States*, 312 U. S. 473, 483-84 (1941), of setting aside the conviction under a mail fraud count because the absence of a "security" required reversal of the concurrent conviction under a §17(a) count.

The Respondents' attempt to counter this two-violations argument by stating (Resp. Br. at 6 n. 6) that "Criminal charges may be brought for willful violations of §11 pursuant to §24 of the 1933 Act, 15 U. S. C. §77x," can only confuse the issue. That statement is erroneous—egregiously so. One cannot "violate" a provision like §11 that simply creates civil liability. An indictment purportedly laid under §11 would be dismissed. And §24 is not tied into §11 as such. Rather, §24 is a self-contained section, to the effect that "Any person who . . . willfully, in a registration statement . . . , makes any untrue statement of a material fact or omits to state any material fact

required to be stated therein or necessary to make the statements therein not misleading" commits a crime.

2. As observed in Judge Williams' dissent, the very "meticulously reasoned" nature of the majority opinion obscures the untenable result of precluding *any* private action for manipulation—certainly a practice as worrisome to the Congress as the use of false selling literature, and a practice hardly touched by state law—by a person who *arguendo* cannot satisfy the "affected by" requirement of §9(e), 15 U. S. C. §78i(e).

Third: All this is aside from the fact that the majority below misconstrued §9(e) in the first place when it failed to appreciate that *every* price of a manipulated security is manifestly a false price, and thus an "affected" price, until the manipulation is revealed and the market reacts.

Fourth: We disagree, of course, with the Respondents' repeated assertion that affirmance in this case would be consistent with affirmance in *Herman & MacLean.*[5] But we do agree with the Respondents' statement that "charges can be brought for willful violations of §9(a) and §10(b) pursuant to §32 of the 1934 Act, 15 U. S. C. §78ff" (Resp. Br. at 6 n. 6). Indeed, that is our whole point—that, if there can be separate criminal prosecutions or SEC injunction actions for distinct violations of §§9 and 10(b), there can likewise be separate private actions.

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5. Even under a narrow view, the conduct in this case covered by Rule 10b-5 was not the same as that covered by §9. For example, some of the securities sold to Petitioner in the off-market transaction were securities not registered on any national exchange. Moreover, in acquiring its Westec shares, Petitioner sold nonregistered (nonlisted) *stock and notes* of its subsidiary (Pet. for Cert. at 2; 682 F.2d at 1155; A4), and not *assets* of the subsidiary as erroneously stated by Respondents (Resp. Br. at 1).

CONCLUSION

To let the judgment below stand in the face of *Herman & MacLean* would not only make for injustice in this case but also—and more importantly from the point of view of this Court's mission—create a confusing dichotomy for the lower courts in a field of the law that this Court has repeatedly sought to clarify in recent years.

The writ of certiorari prayed for should issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LOUIS LOSS

1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
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Counsel of Record for Petitioner

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